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IN THE

Supreme Court of the United States

October Term, 1967

No. [redacted] 5

SIDNEY STREET,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

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October Term, 1967

No. .....

SIDNEY STREET,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Court of Appeals of the State of New York entered on July 7, 1967 affirming the judgment of the Appellate Term of the Supreme Court, of the Second Department, dated December 23, 1966, affirming the judgment of conviction rendered in the Criminal Court of the City of New York, County of Kings on August 9, 1966. Appellant submits this statement to show that the Court has jurisdiction and that substantial questions are presented.

Opinion Below

The opinion and judgment of the New York Court of Appeals was rendered on July 7, 1967 and is reported at 20 N. Y. 2d 231, 282 N. Y. S. 2d 491 (1967). The text of the opinion is set out in the Appendix, *infra,* p. 1a to 8a. No written opinion or memorandum was handed down by the Appellate Term of the Supreme Court or the Criminal Court.

Jurisdiction

This is an appeal of a conviction for violation of Section 1425, subd. 16, paragraph (d) of the Penal Code of the State of New York. The judgment of the Court of Appeals of the State of New York was entered on July 7, 1967. Notice of Appeal was filed September 1, 1967.

Jurisdiction of the Supreme Court to review the decision of the Court of Appeals by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *DeVeau* v. *Braisted,* 363 U. S. 144 (1960); *Schware* v. *Board of Bar Examiners,* 353 U. S. 232 (1957).

Questions Presented

1. Does §1425, subd. 16, paragraph (d), on its face or as applied, unconstitutionally abridge appellant's First Amendment right to free speech?

2. Does the statute, on its face or as applied, unconstitutionally abridge appellant's freedom of expression as

granted by the First Amendment because it is so broad in scope as to sweep within its ambit conduct both innocent and criminal?

3. Is the statute, on its face or as applied, so ambiguous, vague and indefinite as to fail to apprise the defendant of the meaning of the enactment thus making it unconstitutional as a deprivation of individual liberty without due process of law, in violation of the Fourteenth Amendment?

Statute Involved

New York State Penal Law, §1425:

"16. Any person, who

a. • • •

b. • • •

c. • • •

d. Shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon either by words or act, [any such flag] • • •

e. • • •

f. • • •

g. • • •

Shall be deemed guilty of a misdemeanor; • • •"

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any

size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York."

Statement of the Case

This appeal challenges the constitutionality of §1425, subdivision 16, paragraph (d), of the Penal Code of the State of New York. The statute, on its face prohibits an individual from using words or acts *in public* to "mutilate, deface, defile, or defy, trample upon, or cast contempt upon" the flag, standard, color, shield or ensign, or any picture or representation thereof of the United States of America or the State of New York.

The appellant, a Negro, Sidney Street, is a veteran of World War II, and recipient of the Bronz Star (R. 16).* He holds a responsible position with the New York City Transit Authority, is married and has no prior criminal record of any kind (R. 16).

Sometime between 6 and 7 p.m. on Monday, June 6, 1966, Street was sitting in his Brooklyn apartment listening to the radio when he heard a news announcement that James Meredith had been shot during his march through Mississippi (R. 16).

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* "R" references are to pages in the certified Record on Appeal.

Street went to a bureau drawer and carefully took out an old 48-star American flag that some years before had been presented to his wife after its use to drape the coffin at the burial of her step-father, a veteran who had been revered by both Street and his wife (R. 17).

Street carried the flag, which he and his wife had used on many occasions to celebrate national holidays, to the intersection of Lafayette Avenue and St. James Place, one block from his residence (R. 17).

Street first carefully laid a piece of paper on the sidewalk; then, keeping the flag properly folded and holding it in one hand, he set it on fire with a match (R. 17). He held the burning flag in his hand as long as he could, then laid it carefully on the piece of paper so that it would not touch the sidewalk (R. 17).

A police officer in a passing patrol car saw the smoke from the fire, stopped to investigate, and saw the burning flag (R. 18). After talking with various people who had gathered around the flag, the officer saw Street, and heard him say "We don't need no damn flag" (R. 11). The officer asked Street if he burned the flag, and Street replied, "Yes; that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag" (R. 11).

The officer put out the fire, took the unburned portion of the flag, and arrested Street (R. 11). Street was later charged with two crimes. One of the charges against Street was for disorderly conduct. The other was a charge that he had engaged in:

> "Malicious mischief in that defendant did wilfully and unlawfully defile, east contempt upon and burn an American Flag, in violation of 1425(16)(d) of the

Penal Law under the following circumstances: On the aforesaid date, place and time, the defendant did wilfully and unlawfully set fire to an American Flag and shout, 'If they did that to Meredith, we don't need an American Flag' " (R. 3).

Street was acquitted of the charge of disorderly conduct, but convicted of violating section 1425(16)(d) of the Penal Law, and it is from this conviction that Street now appeals (R. 19).

How the Federal Question Is Presented

Prior to pleading not guilty, Appellant moved to dismiss the information on the grounds that it did not state facts sufficient to constitute a crime (R. 7). Appellant claimed that he was engaged in a constitutionally protected activity under the First Amendment of the Constitution of the United States and under the New York State Constitution, specifically, freedom of speech. The motion was denied (R. 7). Appellant then pleaded not guilty and renewed his motion at the end of People's case (R. 15) and again at the end of the entire case (R. 19). The motions were denied (R. 19). The constitutional issues relating to the first and Fourteenth Amendments were raised on appeal before the Appellate Term of the Supreme Court and the Court of Appeals of the State of New York. The Court of Appeals, in affirming the lower court judgment, specifically passed on the constitutional issues.

The Questions Are Substantial

Appellant's conviction raises fundamental questions of the extent to which the states, or the federal government,[1] may restrict free expression in order to protect symbols of sovereignty. As the New York Court of Appeals said: "We are called upon to decide whether the deliberate act of burning an American flag in public as a 'protest' may be punished as a crime." App., *infra*, p. 2a.

Each of the states and the District of Columbia has a flag desecration statute similar to New York's.[2] These statutes have largely remained unchallenged.[3] However, as the tempo of protest against a variety of traditional social values and unpopular government action increases, adoption and enforcement of laws designed to protect the symbols of government become increasingly frequent. Thus,

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[1] The Congress has under consideration a Federal Flag Desecration Act, discussed in greater detail, *infra*.

[2] Hearings before Subcommittee No. 4 of the Committee of the Judiciary, House of Representatives, 90th Cong., 1st Sess., pp. 324-346.

[3] This Court, in *Halter* v. *Nebraska*, 205 U. S. 34 (1907), considered one such statute in the context of a violation for the use of the flag on a beer bottle label, and upheld the statute against constitutional challenges based upon federal preemption, taking of property without due process, and failure to provide equal protection of the laws. No argument was made or considered that related to First Amendment rights. See also, *People ex rel. McKike* v. *Van DeCarr*, 91 App. Div. 20 (1904); *People* v. *Picking*, 23 N. Y. S. 2d 148 (Magistrate's Ct. City of New York, 1940), *aff'd per curiam* 263 App. Div. 366 (— Dept. 1942), *aff'd w.o. opinion* 288 N. Y. 644, 42 N. E. 2d 741 (1942); *Hinton* v. *State*, 223 Ga. 174, 154 S. E. 2d 246 (1967); *United States Flag Foundation* v. *Radich*, 53 Misc. 2d 597, 279 N. Y. 2d 233 (Sup. Ct. N. Y. County, 1967); *People* v. *Radich*, 53 Misc. 2d 717, 279 N. Y. S. 2d 680 (Cr. Ct. City of N. Y., 1967).

the Senate presently has before it a Federal Flag Desecration bill, passed by the House of Representatives in June of this year, which grants the federal government concurrent criminal jurisdiction over acts of desecration against the American flag. In August, 1965, the Congress prohibited the burning of draft cards, after listening to debates betraying unmistakable hostility to those who destroy symbols of authority and thereby challenge the policies of the government.[4] And on August 24, 1967, National Park Service officials sought to seal off the White House, the symbolic seat of government, from mass protest by restricting to 100 the number of pickets who could demonstrate there at one time.[5]

The New York Court of Appeals, in affirming appellant's conviction, relied heavily upon this Court's statement in *Cox* v. *Louisiana*, that the First and Fourteenth Amendments do not "afford the same kind of freedom to those who would communicate ideas by conduct *such as patrolling, marching, and picketing on streets and highways*, as these amendments afford to those who communicate ideas by pure speech," 379 U. S. 536, 555 (1965) (emphasis added). The court below omitted the words emphasized in this quotation, however, and by this omission implied that it saw all conduct as intrinsically different from "pure speech." Such a distinction fails to recognize the nature of appellant's act.

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[4] Two challenges to the law are now pending before this Court. *United States* v. *Miller*, 367 F. 2d 72 (2d Cir. 1966), cert. den., 386 U. S. 911 (1967), Motion for Rehearing filed April 29, 1967; *United States* v. *O'Brien*, 376 F. 2d 538 (1st Cir. 1967), Petition and Cross-Petition for Certiorari filed, 35 L. W. 3439, 3448 (1967). Cf. *Bond* v. *Floyd*, 385 U. S. 115 (1966).

[5] New York Times, August 25, 1967, p. 12.

1. §1425, subdivision 16, paragraph (d) of the New York State Penal Law, on its face and as applied, unconstitutionally abridges Appellant's First Amendment right to free verbal and symbolic speech.

Frequently, those who have greatest cause to protest are those who, by reason of economic and educational deprivation, do not have access to the mass media and cannot undertake the lobbying activities of better endowed groups. Public demonstrations symbolizing their grievances are often their only recourse.[6]

> "People seldom realize that a style of dress, of hair, *and of every kind of external nonconformity represents a sort of language, albeit frequently vague and unintelligible.* So far, no one has compiled a dictionary of these 'languages' nor researched their grammar and syntax. Nevertheless, they are forms of expression. . . . Languages themselves would have no significance if objects did not possess a speech of their own. World literature would be meaningless if the human spirit did not try to express itself in the most divergent possible ways." Singer, "The Extreme Jews," *Harper's Magazine* 55, 56, April 1967 (emphasis added).

Appellant's act was provoked by the immediate anger he experienced at the assault committed against James Meredith in Mississippi, and under the First Amendment he had a right to communicate that anger to his fellow citizens in a way that inflicted no injury upon them. The manner by which he chose to express his anger represented his belief that a society that fostered, and a government

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[6] Prof. Kalven has observed that the sit-in demonstration is the "poor man's printing press." Kalven, *The Negro and the First Amendment*, 133 (1965). Cf. *Martin* v. *Struthers*, 319 U. S. 141, 146 (1943): "Door to door distribution of circulars is essential to the poorly financed causes of little people."

that tolerated, the conditions which Meredith was himself protesting, betrayed his trust. For the moment, therefore, he sought to express his belief by destroying what he regarded as the official symbol of trust.

Beginning with the Montgomery bus boycott, protesting segregation of Negroes on city buses, those who would call attention to the racial inequities in our society, or those who would challenge the values and decisions of the majority,[6a] have been seeking new ways to communicate these ideas to the majority.[7]

We are told that the national flag, by its stripes, *symbolizes* the thirteen original states. Other legends relate the red to the blood of our ancestors shed in obtaining our freedom, and the white is symbolic of liberty; the field of blue with its stars, one *representing* each state—this entire matter is one of vesting an object of no intrinsic or utilitarian worth with value, as a means of unified expression. Justice Jackson recognized that "The use of an emblem or flag to symbolize some system, idea, institution or personality, is a short cut from mind to mind." *West*

[6a] Many scholars point out that our prevailing values, and laws, are not the creation of a majority, but, in the words of Lewis Mumford, are the creation of a "dominant minority." Mumford, *The Myth of the Machine: Technics and Human Development* (1967).

[7] *Brown* v. *Louisiana*, 383 U. S. 131 (1966) (sit-in at public library protesting segregated facilities); *Peterson* v. *City of Greenville*, 373 U. S. 244 (1963) (sit-in at lunch counter to protest segregation ordinance); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963) (mass march on State Capitol protesting segregation); *United States* v. *Miller* and *United States* v. *O'Brien*, *supra*, n. 4 (burning of draft cards); *Kissinger* v. *New York City Transit Authority*, —— F. Supp. —— (S. D. N. Y., Sept. 12, 1967) (prohibition against placing of anti-war subway advertising invalidated); *Williams* v. *Wallace*, 240 F. Supp. 100 (M. D. Ala. 1965) (mass march from Selma to Montgomery, Alabama, protesting segregation).

Virginia State Bd. of Education v. *Barnette*, 319 U. S. 624, 632 (1943). Earlier, in *Halter* v. *Nebraska, supra*, this Court observed that "the flag is an *emblem* of National sovereignty." *Supra* at 41.

The right of government to construct such symbols is not in question. What is in question is the power of government to prevent the people from communicating, by actions relating to that symbol, a contrary message.

This conviction may be affirmed by this Court only if it is ready to decide that the First Amendment right of free expression can be exercised only by the means that those in power choose to permit. The guarantee of free expression, by a diversity unlimited as to means so long as those means do not interfere with the rights of others, is the spirit in which the authors of the Bill of Rights conceived these great protections of the minority.[7a] That these means include those which will allow speech to be most effective is of that same spirit. See, e.g., *Saia* v. *New York*, 334 U. S. 558, 561 (1948) (ban on loudspeakers invalidated because they are "indispensable instruments of *effective* public speech. . . . *It is the way people are reached*") (emphasis added).

The need for continuing exploration of the expanding application of the First Amendment is as apparent from the headlines as it is from the reported decisions of the state and federal courts. To choke off the peaceful, though

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[7a] History offers some dramatic examples of the type of activity in which appellant engaged. William Lloyd Garrison registered his protest against slavery by publicly burning a copy of the Fugitive Slave Law and the United States Constitution. Crosby, *Garrison the Nonresistant*. Martin Luther publicly burned on the steps of a Wittenberg church a papal bull excommunicating him. Ergang, *Europe from the Renaissance to Waterloo*.

non-verbal means by which our disaffected, discontented and—for many—formerly disenfranchised citizens can make their message known is both unconstitutional and unwise. It runs the risk of reaping the whirlwind. To foreclose the communication of ideas not only deprives persons of the rights guaranteed them by the First Amendment but deprives society of its most effective means for self-correction. See, generally, Emerson, "Toward a General Theory of the First Amendment," 72 *Yale L. J.* 877 (1963).

2. *The statute, on its face and as applied, unconstitutionally abridges the appellant's First Amendment right of free expression by prohibiting both innocent and criminal conduct.*

The New York Court of Appeals interpreted the statute at bar to prohibit certain "non-verbal expression," and said that

> "... if the State can show that the prohibition of certain conduct is designed to promote the public health, safety, or well being, then, 'the circumstance that such prohibition has an impact on speech or expression' does not render the legislation violative of the First Amendment ... providing, of course, that other channels of communication are open and available." App., *infra*, p. 5a.

Without accepting the Court's view that the existence of "other channels" of communication may permit a legislature to forbid certain peaceful means of exercising First Amendment rights, compare *Schneider* v. *State*, 308 U. S. 147 (1939), it must be noted that this view ignores the possibility that appellant was convicted for his spoken words, as well as for burning the flag.

Neither the information, which charged appellant with violating the statute by speaking certain words and doing certain acts (R. 3), nor the general verdict of guilty, show whether the appellant was convicted for the act of burning the flag or for the words spoken at the time. *Stromberg* v. *California,* 283 U. S. 359 (1931); *Winters* v. *New York,* 33 U. S. 507, 509; *Williams* v. *State of North Carolina,* 317 U. S. 287, 291-292.

It is a fundamental principle of constitutional law that statutes restrictive of or purporting to place limitations upon First Amendment freedoms must be narrowly drawn to meet the precise evil the legislature seeks to curb. A statute so broad as to sweep within its ambit conduct both innocent and criminal cannot stand. *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Stromberg* v. *California, supra; Baggett* v. *Bullitt,* 377 U. S. 360 (1964). The difficulties such a statute would present to this Court if, as the bill now before the Congress does, it merely prohibited one from publicly "mutilating, defacing, defiling or trampling upon" the flag are magnified when phrased to permit the punishment of one who "defies" or "casts contempt . . . either by words or act" upon the flag. These words were the subject of a communication from Hon. Ramsey Clark, Attorney General of the United States, to the House Committee that had the pending federal bill under consideration. The Attorney General advised the Committee that:

> "Particular care should be exercised to avoid infringement of free speech. To make it a crime if one 'defies' or 'casts contempt * * * either by word or act' upon the national flag is to risk invalidation. This broad language may be too vague under standards of

constitutional law to constitute the basis of a criminal action. Such language reaches toward conduct which may be protected by first amendment guarantees, and the courts have found vagueness in this area. These issues were not involved in *Halter* v. *Nebraska,* 205 U. S. 34 (1907) which upheld the power of a State to enact legislation with respect to the flag, but are suggested by more recent decisions of the courts dealing with other conduct involving manifestations of respect or disrespect for the flag and the system of government it represents. See, e.g., *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943); *Stromberg* v. *California,* 283 U. S. 359 (1931); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964).[8]

The New York statute involved here seemingly has two purposes. First, to encourage reverence and respect for the flag.[9] Second, and according to the Court of Appeals, the "clear" statutory purpose (App., *infra,* p. 6a), "to prevent a breach of the peace." *Ibid.*

There is ample ground upon which to assert that the Court of Appeals was in error in its expression of the statutory purpose. There is no legislative history to indicate this purpose. In addition, the prohibition against flag desecration is part of a malicious mischief statute.[10]

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[8] House of Representatives Rep. No. 350, to amend Chap. 33, Title 18 U. S. C.

[9] This was acknowledged by the District Attorney and counsel for the United States Flag Foundation, *amicus,* in argument before the court below, to be the primary purpose of the legislation.

[10] §1425 has been eliminated from the New York Revised Penal Law of 1965 by §500.05, effective September 1, 1967. It has been incorporated in entirety into the General Business Law, §136.

If the purpose were to encourage reverence and respect for the flag, this conviction is on most tenuous grounds, for the statute would fall as an act compelling an expression of belief in violation of the First Amendment. *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Taylor* v. *Mississippi*, 318 U. S. 583 (1942).

If the legislative purpose is to prevent a breach of peace by those who may tend to grow violent when they see their American flag desecrated, the statute is unconstitutional. Street's burning the flag on the street corner and proclaiming that "If they did that to Meredith, we don't need the American flag" is not an "incitement to riot," as was found to exist in *Feiner* v. *New York*, 340 U. S. 315 (1940), or the creation of any other "clear and present danger" which would authorize interference with his First Amendment rights. *Schenck* v. *United States*, 249 U. S. 47, 52 (1919). Indeed, any such claim is precluded by the trial court's dismissal of the second charge of disorderly conduct against appellant. Moreover, we have long since passed the era that the threat of an angry crowd, or resentment by the listener against what is said, is a substantive reason for enactment of a statute that on its face restricts free speech. *Terminiello* v. *Chicago*, 337 U. S. 1 (1940); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Cox* v. *Louisiana*, 379 U. S. 536 (1965).

3. The statute is so ambiguous, vague, and uncertain on its face and as applied as to fail to apprise appellant of its meaning, in violation of the Fourteenth Amendment.

It is a well established principle that conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation. *United States* v. *Congress of Industrial Organizations*, 335 U. S. 106, 141-142 (1947). What words or acts are encompassed by the statute's terms "mutilate, deface, defile, *defy, or cast contempt upon*"?

One need not extend his imagination to visualize conviction for the failure to take one's hat off as the flag passes by or improper display of the flag or perhaps even refusal to own and display a flag on national holidays.[11] The Court's language in *Baggett* v. *Bullitt, supra*, at 371, is particularly pertinent:

> "We also conclude that the 1931 oath offends due process because of vagueness. It exacts a promise that the affiant will by precept and example promote respect for the flag and the constitutions of the United

[11] Three cases arising under the statute illustrate the broad range of conduct which it is construed to reach. Two cases involve the public display of some pieces of sculpture, incorporating the flag, which were intended as a protest against the government. In *People* v. *Radich*, 53 Misc. 2d 717, 279 N. Y. S. 2d 680 (Cr. Ct. City of N. Y., 1967), the sculptor was convicted under the same section of the statute in question here. In *United States Flag Foundation, Inc.* v. *Radich*, 53 Misc. 2d 597, 279 N. Y. S. 2d 233 (Sup. Ct. N. Y. County 1967), the Supreme Court refused to dismiss a complaint brought under subsection 16 of §1425 which allows for recovery of damages for violation of the statute.

In *People* v. *Place, et al.*, four actors were arrested for using a flag as a prop in a play criticizing contemporary American values. The charges were dismissed on motion of the District Attorney on May 23, 1967.

States and the State of Washington. The range of activities which are or might be deemed inconsistent with the required promise is very wide indeed. The teacher who refuses to salute the flag or advocates refusal because of religious beliefs may well be accused of breaching his promise. . . . Every criticism of the design or color scheme of the state flag or unfavorable comparison of it with that of a sister state or foreign country, could be deemed disrespect for and therefore violative of the oath."

CONCLUSION

For the reasons stated above, jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

20 N. Y. 2d 231

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

SIDNEY STREET,

Appellant.

Court of Appeals of New York

July 7, 1967

Defendant was convicted in the Criminal Court of the City of New York, Kings County, Ludwig C. Glowa, J., at time of trial, Bernard J. O'Connell, J., at time of sentence, of public desecration of the American flag. The defendant appealed. The Appellate Term of the Supreme Court in the Second Judicial Department affirmed. Appeal was allowed by permission of an associate judge of the Court of Appeals. The Court of Appeals, Fuld, C. J., held that the defendant's public burning of American flag as a protest against the shooting by a sniper of a civil rights leader while participating in a civil rights march in Mississippi was an act of incitement which was as fraught with danger to public peace as if he had stood on the street corner shouting epithets at passing pedestrians, and the state could legitimately curb such activities in interest of preventing violence and maintaining public order, nothwith-

standing that no violence actually did occur as result of flag burning.

Affirmed.

David T. Goldstick and John Somers, New York City, for appellant.

Aaron E. Koota, Dist. Atty. (Harry Brodbar, Brooklyn, of counsel), for respondent.

Peter M. Brown and Terence F. Gilheany, New York City, for United States Flag Foundation, Inc., amicus curiae.

FULD, Chief Judge.

We are called upon to decide whether the deliberate act of burning an American flag in public as a "protest" may be punished as a crime.

On June 6, 1966, after hearing on the radio that James Meredith, the civil rights leader, had been shot by a sniper in Mississippi while participating in a civil rights "march", the defendant—a decorated World War II veteran—decided to express his indignation and publicly to protest the tragic happening by burning an American flag. Owning two—one with 50 stars, the other with 48—he selected the latter and burned it on a street corner, telling the small crowd which collected that "[i]f they let that happen to Meredith we don't need an American flag." The defendant was arrested, tried and convicted for violating the provision of the Penal Law, Consol. Laws, c. 40 (§1425, subd. 16, par. d) which makes it a misdemeanor to "publicly mutilate" the United States flag.[1] He was acquitted of a sec-

[1] Although paragraph d of subdivision 16 does not mention the word "flag", no one could possibly be misled as to the object of

ond charge of disorderly conduct and given a suspended sentence.

There is no doubt that "nonverbal expression" may be "a form of speech" within the meaning and protection of the First and Fourteenth Amendments. (People v. Stover, 12 N. Y. 2d 462, 469, 240 N. Y. S. 2d 734, 739, 191 N. E. 2d 272, 276, app. dsmd. 375 U. S. 42, 84 S. Ct. 147, 11 L. Ed. 2d 107; see Brown v. State of Louisiana, 383 U. S. 131, 142, 86 S. Ct. 719, 15 L. Ed. 2d 637 [sit-in]; Carlson v. People of State of California, 310 U. S. 106, 112, 60 S. Ct. 747, 84 L. Ed. 1104 [picketing]; Stromberg v. California, 283 U. S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 [display of red flag]; cf. West Virginia State Board of Education v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 [flag salute].) However, this does not mean that "the same kind of freedom [is afforded] to those who would communicate ideas by conduct * * * as these amendments afford to those who communicate ideas by pure speech." (Cox v. State of Louisiana, 379 U. S. 536, 555, 85 S. Ct. 453, 464, 13 L. Ed. 2d 471.) The State may, under its police powers, proscribe many forms of conduct which threaten the peace, security or well-being of its inhabitants, and the Constitution does not require that an exception be made for prohibited activities to which some persons would ascribe symbolic significance. (See People v. Stover, 12 N. Y. 2d 462, 240 N. Y. S. 2d 734, 191 N. E. 2d 272, app. dsmd. 375 U. S. 42, 84 S. Ct. 147, 11 L. Ed. 2d 107, supra; People v. Martin, 15 N. Y. 2d 933, 259 N. Y. S. 2d 152, 207 N. E. 2d 197, cert. den. 382 U. S. 828, 86 S. Ct. 64, 15

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its coverage since it is perfectly evident, from a reading of the subdivision in its entirety, that the provision was meant to apply to public mutilation of the American flag. (Compare L. 1921, ch. 428 with L. 1922, ch. 270.)

L. Ed. 2d 72; People v. Penn, 16 N. Y. 2d 581, 260 N. Y. S. 2d 847, 208 N. E. 2d 789, cert. den. 383 U. S. 969, 86 S. Ct. 1275.). Thus, rejecting arguments by defendants that their protest demonstrations were protected by the First Amendment, the courts have, in recent years, upheld convictions for (1) violation of a zoning ordinance (see People v. Stover, 12 N. Y. 2d 462, 240 N. Y. S. 2d 734, 191 N. E. 2d 272, app. dsmd. 375 U. S. 42, 84 S. Ct. 147, 11 L. Ed. 2d 107, supra); (2) disorderly conduct (see, e.g., People v. Martin, 15 N. Y. 2d 933, 259 N. Y. S. 2d 152, 207 N. E. 2d 197, cert. den. 382 U. S. 828, 86 S. Ct. 64, 15 L. Ed. 2d 72, supra; People v. Penn, 16 N. Y. 2d 581, 260 N. Y. S. 2d 847, 208 N. E. 2d 789, cert. den. 383 U. S. 969, 86 S. Ct. 1275, 16 L. Ed. 2d 309, supra); (3) trespass (see Adderley v. Florida, 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149); (4) failure to retain possession of a draft card (see O'Brien v. United States, 376 F. 2d 538 [1st Cir.]; cf. United States v. Miller, 2 Cir., 367 F. 2d 72, cert. den. 386 U. S. 911, 87 S. Ct. 855, 17 L. Ed. 2d 787); and (5) deliberate disregard of an order closing a river to navigation. (See United States v. Aarons, 2 Cir., 310 F. 2d 341.) As the Supreme Court observed in the *Adderley* case (385 U. S. 39, 48, 87 S. Ct. 242, supra), freedom of expression does not license individuals to speak "whenever and however and wherever they please" (See, also, Walker v. City of Birmingham, 387 U. S. ——, 87 S. Ct. 1824, 18 L. Ed. 2d 1210; Kovacs v. Cooper, 336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. 513.)

It is the teaching of the cases that the constitutional guarantee of free speech covers the substance rather than the form of communication and that the right to employ a particular mode of expression will be vindicated only if it has been outlawed, not because of any legitimate State interest, but solely for the purpose of censoring the under-

lying idea or thought. (See, e.g., Brown v. State of Louisiana, 383 U. S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637, supra; Cox v. State of Louisiana, 379 U. S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471, supra; Carlson v. State of California, 310 U. S. 106, 60 S. Ct. 747, 84 L. Ed. 1104, supra; Thornhill v. State of Alabama, 310 U. S. 88, 101-106, 60 S. Ct. 736, 84 L. Ed. 1093; Stromberg v. People of State of California, 283 U. S. 359, 51 S. Ct. 532, 75 L. Ed. 1117, supra; O'Brien v. United States, 1 Cir., 376 F. 2d 538, supra; but cf. United States v. Miller, 2 Cir., 367 F. 2d 72, cert. den. 386 U. S. 911, 87 S. Ct. 855, 17 L. Ed. 2d 787, supra.) On the other hand, if the State can show that the prohibition of certain conduct is designed to promote the public health, safety or well-being, then, "the circumstance that such prohibition has an impact on speech or expression" does not render the legislation violative of the First Amendment (People v. Stover, 12 N. Y. 2d, at p. 469, 240 N. Y. S. 2d at p. 739, 191 N. E. 2d at p. 276) providing, of course, that other channels of communication are open and available. (Compare Kovacs v. Cooper, 336 U. S. 77, 89, 69 S. Ct. 448, 93 L. Ed. 513, supra, with Bakery & Pastry Drivers & Helpers Local 802 etc. v. Wohl, 315 U. S. 769, 775, 62 S. Ct. 816, 86 L. Ed. 1178.)[2]

For many years now, public desecration of the American flag has been a criminal offense in all of the States. (See "Desecration of the Flag", Hearings on H. R. 271 Before Subcommittee No. 4 of House Committee on Judiciary, 90th Cong., 1st Sess. [Serial No. 4], pp. 324-346.) There

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[2] The First Amendment does not invalidate a statute prohibiting certain bizarre conduct even if the need for restrictive legislation was not fully appreciated until after someone had utilized that form of conduct as a means of social or political protest. (See People v. Stover, 12 N. Y. 2d at p. 466, 240 N. Y. S. 2d at p. 736, 191 N. E. 2d at p. 274.)

is, in fact, a Uniform Flag Law (9B Uniform Laws Annotated [1966], pp. 51-54), closely resembling subdivision 16 of section 1425 of our Penal Law, which has been adopted by more than a dozen States. This sort of legislation was enacted, it has been said, as a reaction to the unseemly practice, adopted in the 1896 presidential campaign, of affixing political slogans to the flag. (See 9B Uniform Laws Annotated [1966], p. 48.) In any event, whatever motivated the Legislature to act, the statutory purpose is clear—it is to prevent a breach of the peace. (See People ex rel. McPike v. Van de Carr, 91 App. Div. 20, 26, 86 N. Y. S. 644, affd. 178 N. Y. 425, 70 N. E. 965; Halter v. State of Nebraska, 205 U. S. 34, 41, 27 S. Ct. 419, 51 L. Ed. 696; People v. Von Rosen, 13 Ill. 2d 68, 70-71.) As the Supreme Court noted in the *Halter* case (205 U. S. 34, 41, 27 S. Ct. 419, 421, supra), "insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." Subdivision 16 of section 1425 is designed to prevent the outbreak of such violence by discouraging contemptuous and insulting treatment of the flag in public. Happily, the courts have not been called upon to apply the statute, or others like it, with any degree of frequency. In People v. Picking, 288 N. Y. 644, 42 N. E. 2d 741, we sustained a conviction under subdivision 16 for exploitation of the American flag in commercial advertising (see, also, Halter v. State of Nebraska, 205 U. S. 34, 27 S. Ct. 419, 51 L. Ed. 696, supra) and other jurisdictions have, on occasion, similarly punished such disrespectful conduct as publicly tearing a flag or throwing it to the ground. (See Hinton v. State, 223 Ga. 174, 154 S. E. 2d 246; State v. Schlueter, 127 N. J. L. 496, 23 A. 2d 249.)

We need not at this time concern ourselves with a display of the flag in a manner which does not clearly manifest an intention to desecrate it. (Compare State v. Kent, Hawaii 1st Cir. Ct., No. 36423, decided Dec. 9, 1966, with People v. Radich, 53 Misc. 2d 717, 279 N. Y. S. 2d 680, and United States Flag Foundation v. Radich, 53 Misc. 2d 597, 279 N. Y. S. 2d 233.)[3] In the case before us, the defendant concededly burned the flag in public, not for the purpose of destroying it "in a dignified way" (U. S. Code, tit. 36, §176, subd. [j]) but rather to express his indignation and sense of outrage.[4] It was an act of incitement, literally and figuratively "incendiary" and as fraught with danger to the public peace as if he had stood on the street corner shouting epithets at passing pedestrians. (See Chaplinsky v. State of New Hampshire, 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031.) The State may legitimately curb such activities in the interest of preventing violence and maintaining public order. (See People v. Penn, 16 N. Y. 2d 581, 260 N. Y. S. 2d 847, 208 N. E. 2d 789, cert. den. 383 U. S. 969, 86 S. Ct. 1275, 16 L. Ed. 2d 309, supra; Chaplinsky v. State of New Hampshire, 315 N. Y. 568, 62 S. Ct. 766, 86 L. Ed. 1031, supra; Milk Wagon Drivers Union v. Meadowmoor Co., 312 U. S. 287, 294, 61 S. Ct. 552, 85 L. Ed. 836; Carlson v. People of State of California, 310 U. S. 106, 113, 60 S. Ct. 747, 84 L. Ed. 1104, supra; Halter v. State of

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[3] The statute, by its terms, does not apply to any use of the flag "expressly permitted" under Federal law or to any representation of the flag, apart from advertising, upon documents, pictures, jewelry, stationery, newspapers or magazines.

[4] On oral argument before our court, the defendant disclaimed any reliance on the fact that the flag in question was obsolete, containing but 48 stars. Indeed, we note that the statute defines an American flag as one "upon which shall be shown * * * the stars, and the stripes, in any number of either thereof".

Nebraska, 205 U. S. 34, 27 S. Ct. 419, 51 L. Ed. 696, supra; cf. Brown v. State of Louisiana, 383 U. S. 131, 139, 86 S. Ct. 719, 15 L. Ed. 2d 637, supra; Garner v. State of Louisiana, 368 U. S. 157, 173-174, 82 S. Ct. 248, 7 L. Ed. 2d 207.)

The violation of the statute may not be condoned simply because the defendant's agitation resulted from the distressing news he had heard on the radio or because no violence actually did occur as a result of the flag burning. These were mitigating circumstances which were properly taken into account by the trial court when it suspended sentence for the conviction. Moreover, since the act in question was specifically prohibited by a statute (Penal Law, §1425, subd. 16) and the defendant could be punished only once for having engaged in such conduct (Penal Law, §1938), the court did not render an inconsistent verdict when it dismissed the more general charge of disorderly conduct.

The judgment of conviction should be affirmed.

Van Voorhis, Burke, Scileppi, Bergan, Keating and Breitel, JJ., concur.

Judgment affirmed.